HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $4.50 PER ANNUM . . . . 60 CENTS PER NUMBER

PREFERENCES UNDER THE BANKRUPTCY ACT — THE POSITION TAKEN BY THE FEDERAL COURTS. — In the recent case of *Grief Bros.* v. *Mullinix*[1] it was made an alternative ground of decision that a purchaser who has partly paid in advance for the year's product of a mill, the owner of which later goes into bankruptcy, has an equitable interest in the product on hand at the time of the bankruptcy, superior to the claims of the trustee in bankruptcy or other creditors. Although such a view is so far supported by other federal cases [2] that it may almost be said to have become the rule of those courts, yet it appears to be in conflict with the federal Bankruptcy Act, as well as with the principles laid down in other cases by the same courts. The difficulty consists in vesting in the purchaser any property interest within four months prior to the bankruptcy, without thereby effecting a preference under the Bankruptcy Act,[3] always assuming that the purchaser can be charged with knowl-

[1] 45 A. B. R. 265. For a statement of the facts in this case, see RECENT CASES, p. 325, *infra*.

[2] McNamara *v.* Home Land & Cattle Co., 105 Fed. 202 (1900); Hurley *v.* A. T. & S. Ry., 213 U. S. 126 (1909); Sieg *v.* Greene, 225 Fed. 955 (1915). Similar views have been held in other jurisdictions. Parker *v.* Garrison, 61 Ill. 250 (1871); Petrolia Mfg. Co. *v.* Jenkins, 29 App. Div. 403 (1898); Langton *v.* Waring, 18 C. B. (N. S.) 315 (1865). See also Lindsay *v.* Jackson, 2 Paige (N. Y.), 581 (1831); Rau *v.* Seidenberg, 53 Misc. (N. Y.) 386 (1907); Young *v.* Mathews, L. R. 2 C. P. 127 (1866).

[3] FEDERAL BANKRUPTCY ACT, § 60 a. As to the meaning of "creditor" in that section, see § 1, par. 9, to the effect that a creditor is one owning a provable claim, and § 63 a, which includes among provable claims any claim founded upon an open account, or upon a contract express or implied.

edge of the bankrupt's financial condition. For it must be conceded that a transfer of the property itself within four months prior to the bankruptcy, in fulfilment of a pre-existing contract obligation, does, in general, constitute a preference under the act.[4] In other words, the purchaser, to prevail against the trustee, must show that, prior to the bankruptcy, he had a property interest in the thing claimed. The problem is to find how and when such an interest could have accrued.

It may be argued that an equitable property interest became vested in the purchaser as soon as the goods came into existence, on the ground that the contract had become one of the kind that equity will enforce specifically.[5] This proposition is of itself open to dispute. For it is clear that, whatever jurisdiction the federal courts may possess, they, like other courts, do not ordinarily specifically enforce contracts for the sale of chattels,[6] and the use of the added circumstance of insolvency as a ground for equitable relief is a matter not yet agreed upon.[7] But even conceding the above theory to be sound, the main difficulty has yet to be encountered. For surely such an equitable interest, whenever it may be deemed to have its inception,[8] cannot attach to the actual goods until those goods exist. It follows that if the equitable interest is inchoate, waiting to attach, then by making such goods within four months prior to the bankruptcy the bankrupt is transferring a property interest and thereby committing a preference.[9]

There seems to be only one way of escape from the above conclusions. If the idea of an inchoate and suspended equity be abandoned, it may be said that after the goods are in existence the law itself transfers to the purchaser an equitable interest therein,[10] and that there is thus no

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[4] See REMINGTON, BANKRUPTCY, 2 ed., § 1316.

[5] In support of such an equitable ownership in chattels as a consequence of a contract specifically enforceable, see Currie *v.* White, 45 N. Y. 822 (1871); Black *v.* Homersham, L. R. 4 Ex. Div. 24 (1878).

[6] Sugar Beets Product Co. *v.* Refining Co., 161 Fed. 215 (1908); Lehman Co. *v.* Island City Pickle Co., 208 Fed. 1014 (1913).

[7] It is said that although insolvency is never a ground for equity jurisdiction, yet it may be a circumstance inducing equity to exercise a jurisdiction it already has. See Heilman *v.* Union Canal Co., 37 Pa. 100, 104 (1860). And many cases reach a similar result. Note 2, *supra;* Clark *v.* Flint, 22 Pick. (Mass.) 231 (1839). See Williams *v.* Carpenter, 14 Colo. 477, 24 Pac. 558 (1890).

But it may well be objected that while insolvency may render the plaintiff's remedy at law still more inadequate, at the same time it makes it unfair that the insolvent's assets be reduced in order that one creditor may be satisfied in full. And this view, that insolvency is rather a ground upon which equity will refrain from exercising its jurisdiction, is not without support. Insurance Co. *v.* Olmsted, 33 Conn. 476 (1866); Chafee *v.* Sprague, 16 R. I. 189, 13 Atl. 121 (1888); Gillett *v.* Warren, 10 N. M. 523, 62 Pac. 975 (1900). See Belding Hall Mfg. Co. *v.* Lumber Co., 175 Fed. 335, 338 (1909).

[8] In the principal case the court appears to think that the plaintiff's equitable interest arose at the time the contract was made. 45 A. B. R. 265, 274. Since it is impossible to have a property interest in property that does not exist, this can only mean that the plaintiff had an inchoate or suspended interest.

[9] On this theory the preference would exist only as to the product of the four months prior to the bankruptcy, not as to the product of the two months immediately following the contract. There is no difficulty in such a separation. *In re* Cobb, 96 Fed. 821 (1899); *In re* Dismal Swamp Co., 135 Fed. 415 (1905).

[10] This, in substance, is the effect of such phrases as "equity will impose a constructive trust," or of any device by which the court is represented as creating a property interest where there was none before.

"transfer by the debtor." [11] This construction is somewhat supported by two cases in the Supreme Court, holding that under a statute giving a mortgagee of future goods no lien until he takes possession, it was not a preference for him to take possession within four months of the bankruptcy of his debtor.[12] These cases seem to permit a property interest to pass from debtor to creditor so long as it is not the debtor himself that effects the transfer. At its best the theory is slightly artificial. It is also open to the objection that, in situations such as that presented by the principal case, it represents equity as acting in a manner expressly forbidden to the debtor to achieve a result that the law declares to be not just but unjust.[13] Such a theory is not a proper basis for a succession of decisions, nor is it even made use of by the courts.

Assuming, then, that a decision such as that in the principal case can only be explained as an exception to the principles of the Bankruptcy Act, it remains to inquire whether there are similar exceptions. There seems to be at least one. If a broker, who has converted stock purchased at the order of a customer, later acquires similar stock and shortly thereafter becomes a bankrupt, it is held that the customer has an equitable interest in the stock so acquired superior to the right of the trustee in bankruptcy.[14] And the rule is extended to allow each of several customers a ratable share in such stock when the amount is insufficient for all.[15] These decisions are open to precisely the same objection that has been taken to the principal case. One reason assigned in their support is that stock is fungible.[16] But money is at least as fungible as stock, and it is settled that a *cestui que trust* gets no property interest in money subsequently acquired by a defaulting trustee,[17] even when such

[11] See Federal Bankruptcy Act, § 60 a.

[12] Thompson *v.* Fairbanks, 196 U. S. 516 (1905); Humphrey *v.* Tatman, 198 U. S. 91 (1905).

[13] The argument is frequently made for the purchaser that he is a "specific creditor," that he did not trust the bankrupt generally but looked to the goods for repayment, and that it would thus be unjust to allow general creditors any share in the money advanced as payment. In the first place, such a theory may or may not be true in fact in any particular case. It is possible that at the time of the advance the purchaser never considered the possibility of the bankruptcy of the vendor. In the second place, it is hard to say that in the principal case the purchaser trusted to any goods, because at the time of the payment there were no goods. In the third place, the theory seems somewhat to assume the question in dispute. For if it were law that a purchaser acquired no superior right in the goods, the likelihood of his trusting to such a right would be considerably reduced. In the fourth place, whatever policy may lie behind fulfilling the hopes of one purchaser, there is surely a stronger policy in securing an equal and substantial justice for all the creditors.

On the other hand, to see that the result of the principal case is unjust, it is only necessary to consider the broadest principles of bankruptcy, which declare that the fulfilment of an obligation to one creditor at the expense of the others is precisely what is to be avoided. Insurance Co. *v.* Olmsted, *supra;* Chafee *v.* Sprague, *supra.* See Belding Hall Mfg. Co. *v.* Lumber Co., *supra*, 338.

[14] Gorman *v.* Littlefield, 229 U. S. 19 (1913). See Richardson *v.* Shaw, 209 U. S. 365 (1908).

[15] Duel *v.* Hollins, 241 U. S. 523 (1915). This decision is important as showing that the theory cannot really be based on an intent of the broker to make restitution. To presume such an intent where it obviously did not exist, amounts to holding that the intent is not necessary.

[16] See Gorman *v.* Littlefield, *supra*, 23, 24; Duel *v.* Hollins, *supra*, 527, 528.

[17] Board of Commissioners *v.* Strawn, 157 Fed. 49 (1907); American Can Co. *v.* Williams, 178 Fed. 420 (1910).

money is so far identified as to be placed in the same general account as the trust fund.[18] Thus the stock cases can hardly rest upon the ground that stock is fungible.

Upon a review of the cases it is hard to avoid the conclusion that in administering the Bankruptcy Act the federal courts have in two classes of cases violated at least the spirit if not the letter of that act. Furthermore, in at least one case a federal court has shown that it is not unfamiliar with the true construction of the act, namely, that a transfer, within four months prior to bankruptcy, of a property interest by a debtor to a creditor who knows the financial condition of the debtor, is a preference.[19]

LIABILITY OF A PHYSICIAN FOR REVEALING OUT OF COURT HIS PATIENT'S CONFIDENCES. — It is curious that not until 1920 should a court of last resort [1] have been called on to determine a physician's liability for voluntarily revealing out of court a patient's confidences. In *Simonsen* v. *Swenson* [2] the Supreme Court of Nebraska held that a physician who disclosed to the landlady of his patient the fact that the patient was, on his diagnosis, suffering from syphilis, was not liable to the patient in damages for such a revelation. The significance of this decision has not failed to stir the medical world.[3]

Heretofore the tendency in the United States had been to seal the doctor's lips — to seal them at a time when they might justifiably [4] have been open. By statutes,[5] widely adopted since 1828,[6] a patient's communications to his doctor (like a client's to his attorney) have been declared inadmissible as evidence. The sponsors of such statutes have sought to support this doctrine of privilege [7] by reasoning which really

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[18] Board of Commissioners *v.* Strawn, *supra;* Mercantile Trust Co. *v.* St. Louis Ry., 99 Fed. 485 (1900); Hewitt *v.* Hayes, 205 Mass. 356, 91 N. E. 332 (1910).

[19] Clarke *v.* Rogers, 183 Fed. 518 (1910). See also the dissenting opinion in Duel *v.* Hollins, *supra*, 530. The English cases cannot be taken as authority in this matter, for by the English law a transfer is not preferential unless the controlling motive was an intent to prefer. *Ex parte* Taylor, 18 Q. B. D. 295 (1886); Sharp *v.* Jackson, [1899] A. C. 419; *Ex parte* Dyer, [1901] Q. B. 710.

[1] The question has apparently never been squarely presented in England. See "Medical Men and Professional Secrecy," 79 JUST. P. 3. And it is no less novel in the United States. See Simonsen *v.* Swenson, 177 N. W. 831 (1920).

[2] 177 N. W. 831 (1920). See RECENT CASES, p. 334, *infra.*

[3] See 75 JOUR. AM. MED. ASSOC. 1207.

[4] In practice, the privilege has not proved an unmitigated blessing, and has been severely criticized as a means of cloaking fraud. See 4 WIGMORE, EVIDENCE, § 2380; Albert Bach, "The Medico-Legal Aspect of Privileged Communications," 10 MEDICO-LEGAL JOUR. 33; 1 HAMILTON, SYSTEM OF LEGAL MEDICINE, 626.

[5] At common law there was no privilege. See The Duchess of Kingston's Trial, 20 How. St. Tr. 355, 574 (1776). This has been deplored by occasional English *dicta:* Buller, J., in Wilson *v.* Rastall, 4 T. R. 753, 760 (1792); Brougham, L. C., in Greenough *v.* Gaskell, 1 My. & K. 98, 103, 39 Eng. Rep. 618, 620 (1833). But the law remains unchanged to-day in England, as it does in those American States which have not adopted the statutory innovation of privilege. Banigan *v.* Banigan, 26 R. I. 454, 59 Atl. 313 (1904).

[6] In this year the privilege was first established by statute passed in New York. For a list of those states which have subsequently followed New York's lead, see 4 WIGMORE, EVIDENCE, § 2380.

[7] See 3 COMMISSIONERS ON REVISION OF THE STATUTES OF NEW YORK, 737 (1836);